TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 62.

THE SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 26, 1910.

(26,854)

(26,834)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 248.

THE SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1919.

1 In the Court of Claims.

No. 24915.

THE SEABOARD AIR LINE RAILWAY

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

On April 18, 1904 the claimant filed its original petition.

Subsequently, to wit, on February 13, 1917, the claimant, by leave of court, filed its amended petition which is as follows:

Amended Petition.

Petitioner, by leave of court, files this its amended petition, and says:

I.

Petitioner is a corporation organized under the laws of the State of Virginia. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Virginia, North Carolina, South Carolina and Georgia. It now owns and operates also railroads which at those times belonged to other corporations which have since been merged into it and to whose rights, in the matters hereinafter stated, it has therefore succeeded. One of said corporations was the Florida Central and Peninsular Railroad Company.

II.

Upon movements of United States troops and freights appurtenant thereto in the years 1897, 1898, 1899, 1900, 1901, 1902 and
2 1903, petitioner and those corporations to which it has succeeded, in some cases by an established general practice of the railway companies of the country, and in other cases by the terms of a special contract made by a bid and acceptance thereof by an authorized officer of the United States army, was obligated to transport free of charge all personal baggage of each man of such troops to the amount of 150 pounds. In making payment for such movements, however, the accounting officer of the United States deducted a number of pounds of freight equal to 150 times the number of men transported, and withheld the compensation accruing on those amounts of freight; ignoring the difference between baggage, the property of the men, and military equipage, stores and supplies, which were the property of the United States.

III.

In many of the cases where such deductions were made the men had only hand baggage, which they carried in the passenger cars, and no baggage whatever was included in those weights of freight for which part payment was made. In other cases, although full facilities were afforded by claimant or said other railroad companies for separate loading and transporting of the baggage, such as the men did not keep with them in the passenger cars, this baggage was loaded by the officers of the army into freight cars and was mingled and confused with the freight and not separately weighed, and the weight of the same cannot now be ascertained. On transactions of both of these classes, therefore, petitioner is entitled to be reimbursed the entire amounts deducted. In those cases where the baggage was separated from freight and weighed separately petitioner is entitled to recover the amounts deducted for freight in excess of the
3 weight of baggage actually transported but classed by the accounting officers as freight. In no case was the average weight of baggage transported as high as 150 pounds per man.

IV.

In said movements large quantities of camp equipage, ammunition and other military stores and supplies were transported. To said shipments there were applicable tariffs and classifications theretofore agreed on between petitioner and other railroad companies within its territory, including petitioner's said predecessors in title, and duly recognized by the accounting officers of the United States as fixing the true rates to be paid by the United States; but in many cases the accounting officers of the army, while recognizing that compensation was due with respect to the same, treated the same as of lower classes of freight than to those in which they truly belonged and allowed to petitioner or its said predecessors in title only the smaller amounts proper to those lower classes.

V.

The deductions thus unlawfully made from claimant's due compensation aggregate twenty-seven thousand dollars; for which sum, therefore, it prays judgment; no part of the same having been paid, and its claim to the same not having been assigned.

THE SEABOARD AIR LINE RAILWAY,
By BENJ. CARTER, *Its Attorney in Fact.*

4 DISTRICT OF COLUMBIA, *ss:*

Before me, Francis L. Neubeck, a Notary Public in and for said District, appeared Benj. Carter, subscriber of the foregoing petition, who being by me sworn, makes oath and says that the allegations of

said petition are true to the best of his knowledge, information and belief.

BENJ. CARTER.

Subscribed and sworn to before me this 5th day of January, 1917.

[SEAL.] FRANCIS L. NEUBECK,
Notary Public, D. C.

5 II. *General Traverse.*

Court of Claims.

No. 24915.

THE SEABOARD AIR LINE RAILWAY

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. History of Proceedings.

On February 27, 1917 the argument of the case on merits was begun by Mr. Benjamin Carter for the claimant, and continued by Mr. Assistant Attorney General Huston Thompson for the defendants, and further argued by Mr. Benjamin Carter for the claimant. On February 28, 1917 Mr. Carter concluded his argument for the claimant and the case was submitted.

On April 9, 1917 the court filed findings of fact and conclusion of law dismissing petition, with an opinion by Downey, J.

On June 7, 1917 the claimant filed a motion to set aside the judgment of April 9, 1917.

On October 15, 1917 the claimant was allowed, in open
6 court, to withdraw its motion filed June 7, 1917, and granted leave to file an amended motion and given to Nov. 1, 1917 to file brief in support thereof.

On October 15, 1917 the claimant filed its amended motion to set aside judgment.

IV. *Order of Court on Claimant's Motion.*

Entered Jan. 7, 1918.

It is ordered by the court That the claimant's motion for a rehearing be and the same is hereby overruled.

The former findings, judgment and opinion are withdrawn and

amended findings are this day filed with conclusion of law dismissing petition. Opinion by Judge Downey.

By THE COURT.

7 V. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.*

Entered January 7, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The Seaboard Air Line Railway is a corporation formed, as hereinafter shown, by the consolidation of a corporation of the same name with another corporation, the Florida Central & Peninsular Railroad Co.

The Seaboard Air Line Railway was a corporation originally organized under the laws of the State of Virginia, and by duly authorized consolidations or mergers with corporations operating railroads in those States had become a consolidated corporation under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Alabama. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Virginia, North Carolina, South Carolina, and Georgia.

The petitioner, the Seaboard Air Line Railway, a corporation formed as hereinbefore stated, now owns and operates railroad lines in the said States and also the railroad lines that, until the consolidation herein mentioned, belonged to another corporation, the Florida Central & Peninsular Railroad Co.

On the 27th day of June, 1903, a company, described as "the Seaboard Air Line Railway, a consolidated corporation, organized and existing under the laws of the States of Virginia, North Carolina, South Carolina, Georgia, and Alabama," and the Florida Central & Peninsular Railroad Co., described as "a corporation duly incorporated and operated under and by virtue of the laws of the States of Florida and Georgia," entered into an agreement called "Articles of agreement of merger and consolidation," prescribing "the terms and conditions of said merger and consolidation and the mode of carrying the same into effect."

8 Article I was as follows:

"The capital stock, franchises, railroads, estates, and properties, real, personal, and mixed, of the said Florida Central & Peninsular Railroad Co. shall be, and they are hereby, united, merged, and consolidated with the Seaboard Air Line Railway, and are to be hereafter owned and controlled as one railroad company."

Article II was as follows:

"The name of said company so formed by the merger and consoli-

dation and union of said railroad companies shall be, and is, the Seaboard Air Line Railway."

Article III prescribed the number of directors of said consolidated company, their officers, and the names of those who shall act as directors and officers until the first annual meeting of the stockholders.

Article IV prescribed where the offices of the company should be located, and Article V prescribed where and when the annual meeting should be held and procedure thereat.

Article VI provided that the capital stock of said consolidated company should be $100,000,000, divided into 1,000,000 shares of $100 each, divided further into 750,000 shares to be "presently issued" and 250,000 shares "issuable hereafter," the 750,000 shares to be further divided into 250,000 shares of preferred stock and 500,000 shares of common stock.

Article VII provided for the distribution of profits, and Article VIII provided "the manner of converting the capital stock of each of said companies into that of the consolidated company," in which, as to the stock of the Florida Central & Peninsular, it is provided:

"2. To the holders of preferred stock of Florida Central & Peninsular Railroad Co. one share of the preferred stock and one share of the common stock of the consolidated company for each share of the preferred stock of said Florida Central & Peninsular Railroad Co.

"To the holders of the common stock of said Florida Central & Peninsular Railroad Co. one share of the common stock of the consolidated company for each share of the common stock of said Florida Central & Peninsular Railroad Co.

"But in the exchange of stock, both common and preferred, of the Florida Central & Peninsular Railroad Co. for the common and preferred stock, respectively, of said Seaboard Air Line Railway, no exchange is to be made for the stock of said Florida Central & Peninsular Railroad Co., either common or preferred, now held and owned by said Seaboard Air Line Railway."

Article IX contained authority for the execution of an indenture of mortgage and Article X was as follows:

"Upon, from, and after the execution of these articles of merger and consolidation, and the ratification thereof by the stockholders of the constituent companies and the filing of the same as required by law, the rights, privileges, and franchises of each of said constituent companies, and all the property, real, personal, and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies shall be transferred to and vested in such consolidated company without further act or deed as effectually as they were in the former companies; and all property, rights of way, and every other interest shall be as effectually the property of the consolidated company as they were of the former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired; and all debts, liabilities, and dues of said companies shall thenceforth attach to the consolidated company and be enforceable against it to the same extent as if said debts, liabilities, and dues had been incurred by it."

Article XI directed that "The president or other proper officer of the said consolidated company shall file a counterpart or copy of these Articles of Agreement of Merger and Consolidation, duly authenticated, with the proper officers in the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida." The copy in evidence is certified by the secretary of state of the State of Florida as—

"a true copy of articles of agreement and consolidation of Seaboard Air Line Railway and Florida Central & Peninsular Railroad Co., dated June 27, 1903, forming the Seaboard Air Line Railway, a corporation created by and existing under the laws of the States of Virginia, North Carolina, and other States, as therein mentioned, which agreement was duly filed in this office on the 15th day of August, 1903."

The said consolidation was made under authority of the statutes of the State of Georgia and the statutes of the State of Florida.

The Seaboard Air Line Railway, as created under the terms of said agreement, is the petitioner in this case, and its petition was filed April 18, 1904.

II.

At the times hereinafter stated movements of United States troops, with freight belonging to the United States, and baggage of the troops, occurred over the line of railroad then operated by said Florida Central & Peninsular Railroad Co., all either being wholly over or terminating on the lines of said company, and none of said movements were over the lines of railroad then owned by the plaintiff herein.

III.

All settlements for movements here involved were made by a disbursing quartermaster of the Army, on presentation of the original bills of lading, on the basis of weights shown thereon. In cases where it appeared by notation on the bill of lading that an amount of baggage claimed free was carried in carload lots, such cars did not appear in the voucher among the items of charge on account of the particular bill of lading referred to by number, and no payment therefor was made. In other cases deduction was made from the total weights of certain classes of freights carried, upon the basis of 150 pounds for each officer and enlisted man shown to have been transported. All settlements were made with the Florida Central & Peninsular Railroad Co., the final carrier, and were for the full sum stated in the vouchers issued therefor, which sums it accepted and retained and gave upon said vouchers its receipt in full therefor, and made no protest. The several movements are hereinafter referred to by the item number given to them in claimant's amended request for findings of fact.

IV.

Item 1 is in connection with the transportation of 49 officers and 934 men of the Fifth Maryland Volunteer Infantry from Rossville, Tenn., to Tampa, Fla., with which there was transported, on bill of lading No. 3, dated June 2, 1898, issued at Rossville, Tenn., by the Southern Railway Co., 8 cars of stock and 15 cars of wagons, harness, tentage, company property, and ammunition of 20,000 pounds each, 3 cars of subsistence stores of a total weight of 29,000 pounds, 1 car of forage of 13,000 pounds, and 1 car of baggage of 11,000 pounds. The Florida Central & Peninsular Railroad was paid for the movement on voucher receipted by its treasurer in full, for said 8 cars of stock, $636. From the total weights of the other 20 cars there was deducted 147,450 pounds, and it was paid for 205,550 pounds at 43 cents per hundred. The receipted voucher upon which payment was made contained, as to this movement, the notation, "Deduct 983 men, at 150 each, 147,450."

Item 2 is in connection with the transportation of 46 officers and 985 men of the Sixty-ninth New York Volunteer Infantry from Rossville, Tenn., to Tampa, Fla., with which there was transported, by bill of lading No. 4, dated June 2, 1898, issued at Rossville, Tenn., by the Southern Railway Co., 8 cars of stock and 15 cars loaded with Army wagons containing harness, tentage, ammunition, and company property, billed at 20,000 pounds each, 1 car of subsistence stores of 16,000 pounds, and 1 car of forage of 10,500 pounds. From the total weights of these 17 cars there was deducted 154,650 pounds as the baggage allowance for 1,031 men at 150 pounds each, and the Florida Central & Peninsular Railroad was paid on its receipted voucher for 171,850 pounds at 43 cents per hundred. The voucher contained the notation, "Deduct 1,031 men, at 150 each, 154,650." For the 8 cars of stock it was paid $636.

Item 3 is in connection with the transportation of 54 officers and 997 men of the Second New York Volunteer Infantry from Rossville, Tenn., to Tampa, Fla., with which there was transported, by bill of lading No. 2, dated July 1, 1898, issued by the Southern Railway Co. at Rossville, Tenn., 9 cars of stock, 17 cars of Army wagons loaded with United States property of 20,000 pounds each, 1 car containing 7,980 pounds of harness and saddles and 5,950 pounds of forage, 1 car company property (baggage), weight 11,500 pounds, 1 car subsistence stores and tentage, weight 12,000 pounds, 1 car headquarters and company property (baggage), weight 20,500 pounds, 1 car company property and stoves, weight 18,500 pounds, and 1 car subsistence stores and forage, weight 11,500 pounds. On the bill of lading was the notation, "Deduct 150 pounds per passenger for 1,051 passengers, being 157,650 pounds. Net weight to be paid for 450,280 pounds." The Florida Central & Peninsular Railroad was paid by voucher receipted in full for 9 cars of stock, of 20,000 pounds each, $715.50, and for 270,280 pounds net in the other cars at the rate of 43 cents per hundred.

11 Item 4 is in connection with the transportation of 50 officers and 953 men of the First District of Columbia Volunteer

Infantry from Rossville, Tenn., to Tampa, Fla., with which there was transported, by bill of lading No. 1, dated June 1, 1898, issued at Rossville, Tenn., by the Southern Railway Co., 7 cars of stock, 15 cars of wagons loaded with tentage and ammunition of 20,000 pounds each, 1 car of subsistence stores and bacon of 17,000 pounds, 1 car of subsistence stores and hay of 12,000 pounds, 1 car of grain and bacon of 14,000 pounds, 1 car baggage and company property of 18,000 pounds, 1 car of baggage and ammunition of 13,000 pounds, and 1 car of company property and baggage of 14,500 pounds. On the bill of lading was the notation, "Deduct 150 pounds baggage per passenger for 1,002 passengers, being 150,300 pounds, making net amount to be paid for 378,200 pounds." The Florida Central & Peninsular Railroad was paid, on its receipted voucher, for said 7 cars of stock $556.50, and on account of the freight moved in the other cars it was paid for 238,200 pounds at 43 cents per hundred.

Item 16 is in connection with the transportation of 1,185 officers and men of the First South Carolina Regiment from Rossville, Tenn., to Jacksonville, Fla., with which there was transported, by bill of lading No. 002, dated July 29, 1898, issued at Rossville, Tenn., by the Southern Railway Co., 6 cars of stock, 12 cars of wagons of 20,000 pounds each, 2 cars of tentage of 24,000 pounds each, 2 cars of subsistence stores of 20,000 pounds each, 1 car of forage of 20,000 pounds, and 1 car of baggage and hospital stores of 10,000 pounds. The rates indicated on the bill of lading were: Stock, $60 per car; wagons, $40 per car; tentage, $100.80 per car; subsistence stores, 53 cents per cwt.; forage, $30 per car; and baggage and hospital stores, 66 cents per cwt. On the face of said bill of lading was the following notation: "Less baggage allowance of 150 pounds for each enlisted man and officer (1,185 officers and men). Net weight, 300,250 pounds." The Florida Central & Peninsular Railroad was paid, on a voucher receipted in full, 20,250 pounds at 30 cents per hundred, 20,000 pounds at 15 cents per hundred, 240,000 pounds at 20 cents per hundred, and for 1 car stock at $60. The voucher upon which payment was made showed the deduction 177,750 pounds as free allowance for 1,185 officers and men.

The bills of lading in items 1, 2, 3, and 4 contain the notation, "Special rates as per letters of Col. J. G. C. Lee, Chief Quartermaster, Department Gulf, dated Camp Geo. H. Thomas, May 30, and 31, 1898." The letter of May 30 referred to, and referring to these four movements, stated:

And the rates agreed upon are as follows:

Officers and men	each	$12.58
Camp equipage, harness, etc	per 100 pounds	.41¾
Wagons and ambulances	per 100 pounds	.29¾
Horses and mules	per car	76.57

In his letter of May 31, Colonel Lee said:

Since writing you yesterday the railroad companies have raised their rates, and I now beg to insert the following rates as to freight:

Camp equipage	per 100 pounds..	$0.83 4/10
Wagons and ambulances (set up or knocked down)	....	.43
Horses and mules	per car..	79.50

The passenger rate is as heretofore advised.

12 The weights herein specified are subject to a reduction of 150 pounds per man, which please deduct from total bill of lading. The enlisted men are, as a matter of course, entitled to carry their side arms in their train. Please instruct the shipping quartermaster accordingly.

With reference to the movement referred to in item No. 16 there is no evidence in the record as to the rate applicable thereto otherwise than as stated in the bill of lading.

All of these five movements, originating on the Southern Railway, were over the lines of the Florida Central & Peninsular Railroad as the final carrier, and payment was made to said final carrier for the service rendered upon vouchers stating the amount to be paid for each of said movements, which vouchers were receipted by the treasurer of the Florida Central & Peninsular Railroad Co., as in full and without protest. Thereafter the Southern Railway Co. commenced an action in this court against the United States, No. 24913A, wherein it sought to recover on account of alleged unauthorized deductions of baggage in connection with a large number of movements of troops of the United States, among which it included the five movements above referred to as items 1, 2, 3, 4, and 16, in addition to which allegation, with reference to unauthorized deductions on account of baggage, it also alleged in its petition in that case, the application of erroneous rates in the payments made on account of the various items of transportation therein included, among which were the five items hereinbefore referred to. The said five items of transportation for which recovery was sought in that case was the same transportation as that sought to be recovered in said five items in this case, evidenced by said bills of lading above enumerated. On the 8th day of February, 1909, in said case No. 24913A, the Southern Railway Co., which was the initial carrier in all of said five movements, and issued all of said bills of lading aforesaid, was by this court awarded judgment in the sum of $23,318.53.

It is shown by the findinfigs of fact in that case that so much of that judgment as was predicated on the five movements here involved was on account of determined excessive deductions of personal baggage.

Item 5.

In connection with the transportation of 50 officers and 1,339 men of the Fifth Ohio Volunteer Infantry from Tampa, Fla., to Fernandina, Fla., there was transported, on bill of lading No. 158, dated, July 22, 1898, issued at Tampa, Fla., by the Florida Central & Peninsular Railroad Co., 7 cars of stock, 2 cars of forage, and 13 cars of wagons and ambulances. On said bill of lading, after the enumeration of the above cars by car number and weight, there was the following notation: "And 13 cars baggage free allowance of 150

pounds each for 50 officers, 1,317 enlisted men, and 29 teamsters." Payment was made for 7 cars of stock at $19.50 per car, and for said 2 carloads of forage, of 50,000 pounds, as class D freight, at 8 cents per hundred pounds, and for said 13 cars of wagons, etc., of 260,000 pounds, as sixth-class freight, at 23 cents per hundred pounds. No payment was made for the 13 cars of baggage.

Item 6.

In connection with the movement of 42 officers and 1,248 men of the Sixty-ninth New York Volunteer Infantry from Tampa,
13 Fla., to Fernandina, Fla., there was transported, by bill of lading No. 174, dated July 24, 1898, issued at Tampa, Fla., by the Florida Central & Peninsular Railroad Co., 7 cars of horses and mules, 1 car of forage, 13 cars of loaded wagons, and 1 car of ammunition, all of 20,000 pounds each. Following the enumeration of said cars by number on said bill of lading there was the following notation: "And 13 cars baggage free allowance of 150 pounds each for 42 officers, 1,225 enlisted men, and 30 teamsters."

Item 7.

In connection with the movement of 47 officers and 1,234 men of the Third Regiment Ohio Volunteer Infantry from Tampa, Fla., to Fernandina, Fla., there was transported, by the Florida Central & Peninsular Railroad, on bill of lading No. 180, issued by said railroad at Tampa, Fla., on the 25th of July, 1898, 2 cars of forage, 7 cars of stock, and 13 cars of wagons, all of 20,000 pounds each. On said bill of lading, in addition to said cars, enumerated thereon by number, was the notation: "And 13 cars baggage free allowance 150 pounds per man for 47 officers, 1,213 enlisted men, and 21 teamsters."

Item 8.

In connection with the transportation of 46 officers and 1,241 men of the Second New York Volunteer Infantry from Tampa, Fla., to Fernandina, Fla., there was transported, by the Florida Central & Peninsular Railroad, by its bill of lading No. 193, issued by it at Tampa, Fla., under date of July 26, 1898, 7 cars of stock, 15 cars of wagons, and 2 cars of forage, all of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading was the notation: "And 10 cars baggage free allowance for 46 officers, 1,229 enlisted men, and 14 teamsters, 150 pounds each."

Item 9.

In connection with the transportation of 3 officers and 100 men of the Third Division, Fourth Army Corps, from Tampa, Fla., to Fernandina, Fla., there were transported, by the Florida Central & Peninsular Railroad, by its bill of lading No. 205, issued at Tampa, Fla., and dated July 28, 1898, 4 cars of stock, 5 cars of wagons, 1 car

of hospital stores, and 1 car of forage. In addition to said cars enumerated by number on said bill of lading there was given the number of an additional car with the notation following: "Free allowance of baggage for 3 officers and 104 enlisted men, 150 pounds each."

Item 10.

In connection with the transportation of 47 officers and 933 men of the First Regiment Ohio Volunteer Infantry from Port Tampa, Fla., to Fernandina, Fla., there was transported, over the Plant System and the Florida Central & Peninsular Railroad, on bill of lading No. 207, issued at Port Tampa on the 28th of July, 1898, by the Plant System Railroad, 8 cars of stock, 13 cars of wagons, and 14 1 car of ammunition, of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading was the notation: "And 13 cars baggage free allowance of 150 pounds per man for 47 officers, 933 enlisted men, and 14 teamsters."

Item 11.

In connection with the transportation of 46 officers and 1,260 men of the One hundred and fifty-seventh Regiment of Indiana Volunteer Infantry from Port Tampa, Fla., to Fernandina, Fla, there was transported by the Plant System Railroad and the Florida Central & Peninsular Railroad, on bill of lading No. 214, issued at Port Tampa, July 29, 1898, by the Plant System, 8 cars of stock, 15 cars of wagons, and 2 cars of forage, all of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading was the notation: "And 10 cars baggage free allowance of 150 pounds per man for 46 officers, 1,246 enlisted men, and 22 teamsters."

Item 12.

In connection with the transportation of 31 officers and 759 men of the Third Regiment Pennsylvania Volunteer Infantry from Port Tampa, Fla., to Fernandina, Fla., there was transported over the Plant System and the Florida Central & Peninsular Railroad, on bill of lading No. 221, issued at Port Tampa by the Plant System on July 30, 1898, 8 cars of stock, 12 cars of loaded wagons, 2 cars of forage, and 1 car of ammunition, all of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading there was noted thereon the following: "And 10 cars baggage free allowance of 150 pounds per man for 31 officers, 741 enlisted men, and 25 civil employees."

With respect to bills of lading 174, 180, 193, 205, 207, 214, and 221, items 6 to 12, inclusive, payment was made on the same basis and in the same form as shown under item 5 as to bill of lading No. 158, in which case loaded wagons were paid for as sixth-class freight. As to bills of lading 174, 180, 193, and 205, it was paid for at 23 cents per 100 pounds. As to bills of lading 207, 214, and 221, it was paid for at 25 cents per 100 pounds. One carload on bill of lading

174 and 1 carload on bill of lading 205 were paid for as first-class freight at 46 cents per 100 pounds. One carload on bill of lading 207 and 2 on bill of lading 221 were paid for as first-class freight at 50 cents per 100 pounds. All payments were upon vouchers calling for the amounts paid and were receipted in full and no protest is shown. The proper classification of the freights involved in these shipments, from items 5 to 12, inclusive, is not shown and the proper tariff rate is not shown. No payment was made for the cars indicated on the several bills of lading as free allowance of baggage, and no claim therefor was ever made by the Florida Central & Peninsular Railroad Co., or by any other company, before the commencement of this suit by this plaintiff.

Item 13.

In connection with the transportation of 8 officers and 682 men of the Third Regiment Cavalry from West Tampa, Fla., to Fer-
15 nandina, Fla., there was transported over the Plant System and the Florida Central & Peninsular Railroad, on bill of lading No. 234, issued August 1, 1898, at West Tampa by the Plant System, 13 cars of wagons, 50 cars of stock, 5 cars of forage, and 4 cars of regimental and company property, all of 20,000 pounds each. In addition to said cars enumerated by number, there was upon said bill of lading the following notation: "And 10 cars baggage free allowance of 150 pounds per man for 8 officers and 682 enlisted men." Said bill of lading called for tariff rates. Settlement was made for 50 cars of stock, at $19.50 per car; 5 cars of forage, weight 100,000 pounds, as class D freight, at 8 cents per hundred; 4 cars of regimental and company property of 80,000 pounds, as class 1 freight, at 46 cents per hundred pounds; and 13 cars of wagons of 260,000 pounds, as class 6 freight, at 23 cents per hundred.

Item 14.

In connection with the transportation of 10 officers and 634 men of the Sixth Regiment United States Cavalry from Tampa, Fla., to Fernandina, Fla., there was transported, by the Plant System and the Florida Central & Peninsular Railroad, on bill of lading No. 242, issued August 5, 1898, by the Plant System, 46 cars of stock, 5 cars of forage of a total weight of 131,935 pounds, and 19 cars of wagons of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading was the notation: "And 14 cars of baggage free allowance 150 pounds per man or 10 officers, 634 enlisted men, and 55 civilian employees." Payment was made to the Florida Central & Peninsular Railroad for 46 cars of stock, at $19.50 per car; 5 cars of forage of 131,935 pounds, as Class D freight, at 8 cents per hundred pounds; for 19 cars of wagons of 380,000 pounds, as class 6 freight, at 23 cents per hundred pounds. No payment was made for said 14 cars of baggage and no claim was made therefor.

Item 15.

In connection with the transportation of 22 officers and 752 men of e Second Regiment of Cavalry from Tampa, Fla., to Fernandina, a., there was transported, by bill of lading No. 254, issued by the ant System at Tampa, Fla., August 3, 1898, over said Plant Sys- n and the Florida Central & Peninsular Railroad, 34 cars of stock, cars of wagons of 20,000 pounds each, and 5 cars of forage of a al weight of 151,016 pounds. In addition to said cars enumerated number on said bill of lading was the notation: "And 14 cars bag- ge free allowance of 150 pounds per man for 10 officers, 782 en- ted men, and 35 civilian employees." For said freight transporta- n the Florida Central & Peninsular Railroad Co. was paid for 34 s of stock, at $19.50 per car; 15 cars of wagons of 300,000 pounds, class 6 freight, at 23 cents per hundred pounds; and 5 cars of for- e of 151,016 pounds, as class D freight, at 8 cents per hundred unds. No payment was made for said 14 cars of baggage and no im was made therefor.

Item 17.

In connection with the transportation of 38 officers and 1,086 men of the First Florida Regiment of Volunteer Infantry from Tampa, Fla., to Fernandina, Fla., there was transported by the Florida Central & Peninsular Railroad Co., on its bill of ding No. 150, issued at Tampa on July 21, 1898, 12 cars of loaded gons of 20,000 pounds each, and 7 cars of stock. In addition to d cars enumerated by number on said bill of lading was the nota- n: "13 cars baggage free allowance for 38 officers, 1,062 enlisted n, and 31 teamsters, 150 pounds each." There was paid the said orida Central & Peninsular Railroad, for said service, for 12 cars of gons of 240,000 pounds, as sixth-class fr-ight, at 23 cents per hun- ed pounds, and for 7 cars of stock at $19.50 per car. No payment s made for said 13 cars of baggage and no claim was made there- .

Item 18.

In connection with the transportation of 9 officers and 220 men, ruits of the United States Army, from Tampa, Fla., to Fer- ndina, Fla., there was transported, on bill of lading No. 255, ued August 4, 1898, by the agent of the Plant System at Tampa, arloads of stock, 5 cars of wagons, and 4 carloads of company operty, all of 20,000 lbs. each. In addition to said cars enumerated number on said bill, there was the notation "And two cars bag- ge free allowance for 2 officers, 211 enlisted men, and 9 teamsters." yment was made to the Florida Central and Peninsular Railroad said freight transportation for 2 cars of stock at $19.50 per car; ars of wagons of 100,000 pounds, as 6th class freight, at 23 cents r hundred pounds; and 4 cars of company property of 80,000 unds, as 1st class freight, at 46 cents per hundred pounds. No

payment was made for said 2 cars of baggage and no claim was made therefor.

Item 19.

In connection with the transportation of 5 officers and 48 men of the 15th Company, United States Signal Corps, from Huntsville, Ala., to Savannah, Ga., there was transported, over the Southern Railway and the Florida Central & Peninsular Railroad, by bill of lading No. 148, issued December 3, 1898, at Huntsville by the Southern Railway Co., 3 cars of stock, 2 cars of equipment, of 24,000 lbs. each, and 4 cars of wagons, of 20,000 lbs. each. Said bill of lading, in addition to said cars enumerated by number thereon, contained the notation "One baggage car free for baggage for 5 officers and 48 men," and the further notation "Agreed rate between Secretary of War and Southeastern Railway Association." The Florida Central & Peninsular Railroad Company was paid for said transportation, for 3 cars of stock, at $100 per car; 2 cars of equipment, of 48,000 pounds, as 5th class freight, at 45 cents per hundred pounds; and for 4 cars of wagons of 80,000 pounds, as 6th class freight, at 35 cents per hundred pounds. No payment was made for said car of baggage and no claim was made therefor.

Item 20.

In connection with the transportation of 11 officers and 90 men of the First Brigade, First Division, First Army Corps, from Knoxville, Tenn., to Savannah, Ga., there was transported, over the
17 Southern Railway and the Florida Central & Peninsular Railroad, by bill of lading No. 28, issued November 28, 1898, at Knoxville by the Southern Railway, 2 cars of commissary, forage, and Army equipment of 24,000 lbs. each; 7 cars of wagons and ambulances of 20,000 lbs. each; and 4 cars of stock. Said bill of lading, following the notation thereon of two cars of commissary, forage, and Army equipment, had upon its face the notation "Less 150 pounds baggage allowed for 101 men." Payment was made for 1 car of 24,000 pounds, as class D freight, at 17 cents per hundred pounds; 1 car of 24,000 pounds, less 15,150 pounds baggage deduction, net 8,850 pounds, as 5th class freight, at 45 cents per hundred pounds; 7 cars of wagons of 140,000 pounds, as 6th class freight, at 35 cents per hundred pounds; and 4 cars of stock, at $87.00 per car. Upon the voucher upon which payment for this transportation was made, and which was receipted by the treasurer of the Florida Central & Peninsular Railroad Co., is the notation "Allow 150 pounds each for 101 men, 15,150 free."

Item 21.

In connection with the transportation of 46 officers and 1,250 men of the 4th Tennessee Regiment Volunteer Infantry from Knoxville, Tenn., to Savannah, Ga., there was transported over the Southern Railway and the Florida Central and Peninsular Railroad, by bill

of lading No. 29, issued November 28, 1898, at Knoxville by the Southern Railway, 11 cars of wagons and ambulances of 20,000 lbs. each; 7 cars of stock, and 14 cars of equipage, commissary, etc., of 24,000 lbs. each. Following the notation on said bill of lading of said 14 cars of equipage, etc., is the notation "Less allowance of 150 equipage, etc., 336,000 pounds less 194,400 pounds, net 141,600 pounds baggage free each, 1,296 men, 46 officers, 1,230 enlisted men, 20 civilians, 194,400." For said movement there was paid to the Florida Central & Peninsular Railroad Co., upon a voucher duly receipted in full by it, for 11 cars of wagons of 220,000 pounds weight, as class 6 freight, at 35 cents per hundred pounds $770; for 14 cars, equipage, etc., 336,000 pounds less 194,400 pounds, net 131,600 pounds, as fifth-class freight, at 45 cents per hundred pounds, $637.20; for 7 cars of stock, 168,000 pounds, at $87 per car, $609; for car rental on a P. H. car No. 2180, $16.14. Notation on settlement: "Allow 150 pounds each for 1,296 men, 194,400 free."

Item 22.

In connection with the transportation of 1,221 officers and men of the First Ohio Volunteer Infantry from Fernandina, Fla., to Jacksonville, Fla., there was transported by the Florida Central & Peninsular Railroad, on its bill of lading No. 22, issued August 27, 1898, at Fernandina, 8 cars of stock, 15 cars of wagons, of 20,000 pounds each, and 8 cars of company and regimental property, of 24,000 pounds each. In addition thereto there was upon the bill of lading the following notation: "12 cars baggage free for 1,221 men and officers." Said bill of lading called for tariff rates. Settlement for said transportation was made with the Florida Central & Peninsular Railroad upon a voucher paid by a disbursing quarter-
18 master of the United States Army, for 8 cars of stock, of 160,000 pounds, at $19 per car, less land-grant deduction, $126.67; for 15 cars of wagons, 300,000 pounds, at 13 cents per hundred pounds, less land-grant reduction, $325; and of 8 cars of company property, 192,000 pounds, at 25 cents per hundred pounds, less land-grant deduction, $400. A receipt of the treasurer of the Florida Central & Peninsular Railroad Co. to the voucher for this service is "in full of the above account and in full of all demands for the service stated therein," and is for the sum of $1,422.36. Why the receipt is for a larger amount than shown by the settlement to have been paid is not shown.

Item 23.

In connection with the transportation of 45 officers and 777 men of the Thirty-first Michigan Volunteer Regiment from Knoxville, Tenn., to Savannah, Ga., there was transported over the Southern Railway, M. & A., Southern Railway, and Florida Central and Peninsular Railroad, by bill of lading No. 28, issued January 9, 1899, at Knoxville, by the Southern Railway Co., 12 cars of equipage and stores of 24,000 pounds each, 16 cars of wagons and ambulances of 20,000 pounds each, and 7 cars of stock. Following the entry upon

said bill of said 12 cars of equipage and stores of 24,000 pounds each is the notation: "Less allowance of 150 pounds baggage for each officer, soldier, and civilian, total, 1,095, 164,250." Payment for said transportation was made to the Florida Central & Peninsula- Railroad Co. for 288,000 pounds, less 164,250 pounds, net 123,750 pounds, as fifth-class freight, at 45 cents per hundred pounds, $556.87; for 16 cars wagons, 320,000 pounds, as sixth-class freight, at 35 cents per hundred pounds, $1,120; for 7 cars of stock, 168,000 pounds, at $87 per car, $609; and for car rental on Keystone car No. 335, $16.

Item 24.

In connection with the transportation of 46 officers and men of the Seventeenth Company, Signal Corps, from Huntsville, Ala., to Savannah, Ga., there was transported by the Southern Railway and Florida Central & Peninsular Railroad, on bill of lading No. 289, issued January 11, 1899, at Huntsville by the Southern Railway Co., 3 cars of stock, 5 cars of wagons of 20,000 pounds each, and 2 cars of company property of 24,000 pounds each. On said bill of lading was the notation: "Car S. R. No. 346, baggage free for allowance of baggage for 46 officers and men. Changing station." Said bill of lading provided that the rate should be the agreed rate between the Secretary of War and the Southeastern Railway Association. The Florida Central & Peninsular Railroad Co. was paid for said transportation for 3 cars of stock at $100 per car; 5 cars of wagons, 100,000 pounds, as class 6 freight, at 35 cents per hundred pounds; and for 48,000 pounds of class 1 freight, at 72 cents per hundred pounds. No payment was made for said car of baggage and no claim was made therefor.

Item 35.

In connection with the transportation of 3 officers and 174 enlisted men of Light Battery A, Second Artillery, from Huntsville, Ala., to Savannah, Ga., there was transported over the Southern Rail-
19 way to Everett, Ga., and over the S., F. & W. to Savannah, Ga., on bill of lading No. 308, issued January 17, 1899, at Huntsville by the Southern Railway Co., 7 cars of stock, 2 cars of company property of 24,000 pounds each, 1 car of forage of 20,000 pounds, 1 car of tents of 24,000 pounds, 3 cars of tent floors of 24,000 pounds each, 3 cars of cannons of 24,000 pounds each, 4 cars of wagons of 20,000 pounds each, and 1 car of baggage of 20,000 pounds. In addition to the enumeration of said cars by number on said bill of lading, there is the notation: "Deduct baggage allowance for 3 officers and 174 men at 150 pounds each." Said bill of lading provides for the rate agreed upon between the Secretary of War and Southeastern Railway Association. The Florida Central & Peninsular Railroad Co. was paid for said transportation for 68,000 pounds, "less allowance for 177 men, at 150 pounds each, 26,550," 41,450 pounds as first-class freight, at 72 cents per hundred, $298.44; for 24,000 pounds as fifth-class freight, at 45 cents per hundred pounds, $108; for 72,000 pounds as fourth-class freight, at 55 cents

per hundred pounds, $396; for 152,000 pounds as sixth-class freight at 35 cents per hundred pounds, $532; for 140,000 pounds, being 7 cars of stock, at $100 per car, $700; or 20,000 pounds class D freight, at 17 cents per hundred pounds, $34; and for rental on car No. 713, $5.45.

V.

Each bill of lading issued in connection with the movements involved herein was prepared by one of the defendant's quartermasters, enumerated the cars involved in the shipment and their contents, and was signed by the agent of the initial carrier, at the point of origin of the shipment, and was receipted by the defendant's quartermaster at the point of destination.

VI.

The bills of lading in the movements referred to as items 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, and 23 called for "tariff rates." In items 19, 24, and 25 they called for an "agreed rate between the Secretary of War and Southeastern Railway Association." The proper classification of the freights involved in these movements, if otherwise than as used as the basis of the settlement, is not shown, and proper tariff rates therefore are not shown. The rates referred to in the bills of lading in items 19, 24, and 25 as agreed rates are not shown. The contents of the cars moved with the various bodies of troops, for which no payment or claim for payment was made, are not shown, otherwise than as described in the bills of lading as "baggage," their content weights are not shown, and tariff or other applicable rates thereon are not shown.

VII.

In a resolution adopted at the meeting of the Southeastern Passenger Association, November 15, 1898, referring to the adjustment of rates with the War Department at the meeting held November 2, net cash rates for passenger movements are agreed upon as a basis for bids when requested by the Government, and it is provided that—

Each passenger to be allowed 150 pounds of baggage free of charge. All excess baggage moved with troops on same train or section thereof to be charged for at the rate of 12 per cent per hundredweight of the through passage fare for these movements. The term "baggage" as herein used being understood to mean personal baggage, tentage, camp equipage, accoutrements, and rations needed for immediate use of troops, it being understood that rates for live stock, cannon, heavy ordinance, ambulances, and wagons (set up or knocked down) shall be obtained from the freight departments and that all property connected with the movements of troops shall be loaded and unloaded without expense to the carriers.

Conclusion of Law.

Upon the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that its petition ought to be and it is dismissed.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court.

The plaintiff sues in this case for alleged underpayments on certain shipments of freights for the United States in the years 1898 and 1899. The freight movements in question were over the Southern Railway and the Florida Central & Peninsular Railroad, some of them originating on the former road and terminating on the latter, and some entirely over the lines of the latter road. In all cases the Florida Central & Peninsular Railroad Co. was either the sole or the final carrier. In no case was the plaintiff herein the carrier. Such payments as were made, for all the shipments herein involved, were made to the Florida Central & Peninsular Railroad Co. on vouchers stating the amount due on account of each shipment and on which there was paid the full amount thereon shown to be due and which were receipted, in full, by the proper officer of the Florida Central & Peninsular Railroad Co." The claim is on account of the deduction, from the various shipments, of certain cars or weights, which were indicated as baggage allowance for the troops of the United States, in connection with the transportation of which said freight movements occurred, on the basis of 150 pounds for each men transported, and also because of alleged misapplication of classifications and rates in the settlements made. The bills of lading, in each instance, were prepared by the defendant's quartermaster at the point of origin of the shipment, enumerated the cars and the contents thereof involved in the shipments, and were signed, in each instance, by the agent of the initial carrier. At the point of destination they were receipted by the proper quartermaster of the defendant.

The first question which is presented in this case is upon the right of the plaintiff to maintain the action. The ground for the objection assigned is that the plaintiff sues to recover an alleged balance of a claim which if it ever had a legal status belonged to the Florida Central & Peninsular Railroad Co.

The undisputed facts are that the Florida corporation, so called herein for brevity's sake, engaged in the movements of troops and property of the United States during the period of their movements during and at the end of the Spanish-American War. That
21 company was a railroad corporation under the laws of Georgia and Florida. Its lines of road extended from Savannah on the north to points in Florida.

The Seaboard Air Line Railway was a railroad corporation originally chartered in Virginia, but by duly authorized consolidations or mergers with roads in other States had become a consolidated corporation under the laws of Virginia, North and South Carolina,

Georgia, and Alabama. In 1903 the Seaboard company, so called for brevity, as consolidated as last above stated, and the said Florida corporation, both acting by and through their respective officers and by concurrence of their stockholders, entered into an agreement looking to their consolidation into a corporation under the name of the Seaboard Air Line Railway, and the agreement was carried into effect. The law of Georgia (sec. 2173, Code of Georgia, 1895) authorizes a railroad company which has constructed a railroad in said State or any other State to make contract with any other railroad company "that will enable said company to run their roads in connection with each other and to merge their stocks or to consolidate with any such company within or without this State, or to lease or purchase the property of any other such company, and hold, use, and occupy the same in such manner as they may deem most beneficial to their interest."

Section 2812 of the general statutes of the State of Florida contains a similar provision to that above quoted from the code of Georgia.

The agreement between said two companies provides and declares that "the capital stock, franchises, railroads, estates, and properties, real, personal, and mixed, of the Florida Central & Peninsular Railroad Co. shall be, and they are hereby, united, merged, and consolidated with the Seaboard Air Line Railway and are hereafter to be owned and controlled by one railroad company"; that the consolidated corporation shall have preferred and common stock; that the holders of the preferred stock in the Florida corporation should receive one share of the preferred stock and one share of the common stock of the consolidated company for each share of preferred stock in the Florida corporation held by them and one share of the common stock of the consolidated company for each share of common stock held by them in the Florida corporation, and that the stockholders in the Seaboard company should receive share for share, whether of preferred or common stock, held in the Seaboard company.

Provision is made for the issue by the consolidated company of its own capital stock in amount exceeding that necessary to take up the shares of stock issued and outstanding by said two companies, and also for the issue by the consolidated company of bonds to the amount of $100,000,000, to be secured by a mortgage or deed of trust upon the properties of the consolidated company.

It is also provided in the agreement that upon the ratification of the same by the stockholders of the constituent companies the rights, privileges, and franchises of each of the constituent companies and all the property, real, personal, and mixed, and all debts due on every account as well as stock subscriptions and other things in action belonging to each of said companies, shall be transferred to and vested in the consolidated company without further act or deed.

22 While the agreement speaks of a merger and consolidation, the name by which the transaction is called is not determinative. The power given by statute was to merge or to consolidate or the purchase of one road by the other. The effect of what was ac-

complished by the agreement and the manifest intention of the parties to the agreement was the creation of a corporation—a legal entity distinct from either of the corporations entering into the agreement. The contract between them speaks of the two "former" companies and of the new or consolidated corporation.

We have no doubt that a new corporation was formed, to which was transferred and assigned the franchises, rights, and properties of each of the former companies.

Yazoo & Mississippi Ry. Co. v. Adams, 180 U. S., 1, 18; Railroad Co. v. Georgia, 98 U. S., 359.

In legal effect the transaction is not different from a purchase by the new corporation of the railroads and properties of the two former companies, so far as the right to collect the debts or claims of either of the former companies is concerned. Nor would there be any difficulty in the new company suing for the recovery of debts due the former companies in the absence of a statute such as section 3477 of the Revised Statutes. That statute forbids assignments of claims against the United States.

Section 3477 of the Revised Statutes has been construed often by this court and by the Supreme Court. One of the latest expressions of the Supreme Court on that question is found in National Bank of Commerce v. Downie, 218 U. S., 345, 353. That case reviews a number of former decisions. Quoting from Spofford v. Kirk, 97 U. S., 484, 488, it approves the following language in that case referring to section 3477: "It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claims, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in the claim of any other than himself." In Spofford v. Kirk an attempt was made by one of the parties to make a distinction between the validity of an assignment as between the parties and the validity of an assignment so far as the United States were concerned. The court said (p. 490): "We can not say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void; that they are valid and effective as between the parties thereto and only invalid when set up against the Government."

In St. Paul & Duluth R. R. Co. v. United States, 112 U. S., 733, 736, it appeared that a voluntary transfer by mortgage for the security of a debt had been made and that there had been a foreclosure of the mortgage consummated by judicial sale, and it was held that the transfer was within the prohibition of section 3477 of the Revised Statutes. In the opinion by Mr. Justice Matthews it was said: "If the statute does not apply to such cases, it would be difficult to
23 draw a line of exclusion which leaves any place for the operation of the prohibition."

It is true that in construing this statute the Supreme Court has

held that a transfer by operation of law does not come within the inhibition of that statute. Erwin v. United States, 97 U. S., 382, 397.

In Goodman v. Niblack, 102 U. S., 556, it was held that a voluntary assignment for the benefit of his creditors made by an insolvent debtor of all his effects is not different from an assignment in bankruptcy and is not within the inhibition of the statute.

In Bailey et al. v. United States, 109 U. S., 432, it appeared that a power of attorney had been given by the plaintiff and payment had been made to the person holding the duly executed power of attorney. The plaintiff sued the United States and sought a recovery upon the ground that the payment to the person holding his power of attorney was unauthorized because the power of attorney was itself void under the influence of section 3477. It was held that the plaintiff could not recover, and was said (p. 440): "But if the protection of claimants was at all in the mind of Congress when passing the acts of 1846 and 1853, it is quite certain that the courts should not, to the injury of the Government, extend that protection to those that elected not to avail themselves of the provisions of those statutes." The plaintiff having given a power of attorney, and it being unrevoked, and payment having been made thereunder by the Government, the court would not allow the plaintiff to question the propriety of the payment.

In Price v. Forrest, 173 U. S., 410, it was held that an order made by a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the Government and ordering the claimant to assign the same to such receiver, to be held subject to the order of the court for the benefit of those entitled thereto, can not be regarded as prohibited by section 3477. The court in that case recognized the rule announced in United States v. Gillis, 95 U. S., 407; Erwin v. United States, supra; Goodman v. Niblack, supra, and St. Paul & Duluth R. R. Co. v. United States, supra.

Manifestly the transfer of the properties and assets of the Florida railroad to the new corporation was not a transfer by operation of law. The agreement between the two corporations under which a third and distinct organization and corporation arose was entirely voluntary on the part of each of them. The terms and conditions upon which the Florida corporation made the transfer of its assets are fully set forth in the agreement between the two companies, and it was only because of said agreement that any transfer was or could be made.

The facts show that the claims now sought to be enforced by the Seaboard Air Line company were claims which are alleged to have accrued to the Florida corporation in the years 1898 and 1899. Part of a claim now asserted was for transportation which originated on the Southern Railway, and it appears that that company brought suit and recovered judgment. The items which are involved in this suit concerning the Southern Railway Co.'s transportation were within the purview of the suit brought by the Southern Railway Co., but were not included in its said suit. It is claimed that the Florida company can now maintain the suit for those items because it was

24 the terminal carrier with whom settlement should have been made. As to all of the items of claim, settlements were made with the Florida company during said years or shortly thereafter. Those settlements are sought to be impeached upon the ground that payments made by the Government on account of transportation of troops and property were incorrect in that the Government officials made deductions on account of baggage when, as it is alleged, the amount of baggage for which deductions should have been made was greatly below the weights upon which settlements were made. In other words, that the Government was not paying the Florida company for property transported and which should have been paid for, and on the contrary has treated as baggage large shipments which were not properly baggage. The Florida company received the vouchers issued in pursuance of the settlements made by the accounting officers. It does not appear that the Florida company made any objection to the settlements, and certainly the Florida company never brought any action in this or any other court to correct the alleged errors. The consolidated company, which is the plaintiff in this suit, was not organized until June, 1903, some four years after the alleged errors had been made against the Florida company. This action was brought in this court in April, 1904, and it seeks to recover on account of the alleged errors in settlements made by the accounting officers with the Florida company.

If under the circumstances stated the status of the Seaboard company in this case is not that of an assignee of a claim, it is difficult to define its status. That assignment was not by operation of law but was the case of a voluntary transfer of claims against the United States before their allowance in direct opposition to the statute. One of the mischiefs sought to be prevented by said statute finds illustration in the case at bar, because it appears that the Florida company brought no action, although more than ample time therefor had elapsed, and that a new corporation which acquired its assets is seeking to enforce claims the settlement of which, so far as the record shows, were acquiesced in by the Florida company. One of the mischiefs which the act was intended to remedy was, as stated in Goodman v. Niblack, 102 U. S., 556, 560, "That, by a transfer of such a claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in presenting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggests." Certainly where a claim is transferred by mortgage, which is subsequently foreclosed, the purchaser does not acquire a right to maintain an action against the United States by virtue of that assignment. St. Paul & Duluth R. R. Co., supra. That being true, how can we say that a voluntary transfer by a corporation of all its assets to another corporation is not an assignment within said section? "We can not say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, * * * shall be absolutely null and void, that they are only partially null and void." Spofford v. Kirk, 97 U. S., 484, 490.

The plaintiff insists that in order to question its right to maintain the action the defendants should have pleaded in abatement, and that having failed to so plead or to file any plea the defendants should not now be heard to say that there was an assignment of the claim. The rules of the court prescribe that in the ent the defendants do not plead within 60 days after suit is brought d notice thereof a general traverse of the petition shall be treated as ed and the case proceed.

The plaintiff relies upon the familiar rule that at common law a ea in bar is a waiver of matter which should be pleaded in abatement.

There are several reasons why the rule invoked by plaintiff should t be applied here. The Court of Claims is not bound by special le of pleading. District of Columbia v. Barnes, 197 U. S., 146, 54.

This court, in Labadie's case, 31 C. Cls., 436, considered the question whether a special plea could be filed after the lapse of the 60 days lowed by the statute for the defendants to plead, answer, or demur, less the time were extended by order of the court, and hold that it as a matter of discretion with the court to allow a plea to be subsequently filed.

But if it were conceded that there is an order of pleading in this urt the principle urged by plaintiff would not be applicable, because e matter of assignment could be pleaded in bar as well as in abatement. Section 159 of the judicial code prescribes what a petition all contain and require the averment that no assignment or transfer of the claim has been made. Section 3477 of the Revised Statutes rbids the assignment of a claim against the United States. The tition in this case does not in terms negative an assignment of nsfer of the claim, but in general terms avers a merger of the o corporations and the succession by plaintiff to the rights of the orida corporation. We have no doubt that the general traverse aches the question of an assignment. In view of the positive terms the statute, it would be the duty of the court to take notice of the ct of an assignment or transfer of the claim sued upon, whether ought to its attention by the defendants or not.

The language of the court in National Bank of Commerce v. ownie, 218 U. S., 345, 356, is apposite: "The present cases are not signments which by operation of law created an interest in the signor's claims against the United States. They are clean-cut cases a voluntary transfer of claims against the United States before eir allowance, in direct opposition to the statute. If any regard atever is to be had to the intention of Congress, as manifested by words—too clear, we think, to need construction—we must hold ch a transfer to be absolutely null and void, and not in itself passg to the appellants any interest, present or remote, legal or equible, in the claims transferred."

The conclusions reached upon the question discussed necessarily termines the right of this plaintiff to maintain this action and quires an adverse judgment.

In our former opinion in this case while announcing the views

above suggested as to the right of the plaintiff to maintain the action we went further and discussed the case as presented by the findings of fact. We called attention to the fact that a stipulation which had been made in a number of cases similar to the one at bar (except the question of assignment), and upon which the other cases had been tried, had been withdrawn by the Assistant Attorney General in this case, who declined to be bound by it. We recognized the rule stated by Judge Howry in the case of Jones & Laughlin v. United States, 43 C. Cls., 178, but we also called attention to the fact that the plaintiff had not asked a continuance of the case when the stipulation was withdrawn. That the withdrawal of the stipulation upon which, up to that time, the plaintiff had relied might be a ground of surprise, which would authorize a continuance in order to enable the parties to supply by proof what they thought was proved by the stipulation, we have no doubt. Plaintiff now by a motion for a rehearing asks leave of the court to supply the requisite proof. Some proof has been taken in other cases of a similar kind to this, but that proof was not brought into this case nor was it considered by the court in the original hearing. Some affidavits are filed with plaintiff's motion for a rehearing, some of which are to the effect that the settlements which were made and which the plaintiff seeks to question, were made by the accounting officers taking the bills of lading with the notations thereon and treating them as accurate exponents of the facts instead of taking the bills presented by the railroad companies themselves. Though the suit was brought in April, 1904, and was not presented to this court for decision until March, 1917, nearly 13 years, we might afford the plaintiff an opportunity of taking additional proof because largely of the surprise to which it was probably put by the withdrawal of said stipulation which affected some but not all of the questions involved in the case. But we are met by the fact that in our opinion plaintiff can not maintain the action because of section 3477 above discussed. And section 165 of the Judicial Code provides: "When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein." Holding to the view we do upon the right of the plaintiff to maintain the action we do not feel justified in putting the parties to the expense of taking additional testimony which can not affect the result.

The findings of fact show the case as it was presented on the former hearing, and our former opinion in the case will be withdrawn and this opinion substituted therefor.

For the reasons stated the motion for a rehearing will be overruled. And it is so ordered.

Hay, Judge; Barney, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

27 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventh day of January, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Seaboard Air Line Railway, as aforesaid, shall not have and recover any sum in this action of and from the defendants, the United States; and, that claimant's petition be and it hereby is dismissed.

By THE COURT.

28 VII. *History of Proceedings After Entry of Judgment.*

On March 7, 1918 the claimant filed a motion in relation to findings of fact.

On the same day claimant filed a motion to extend the time for moving amendments of findings of fact to and including April 10, 1918.

On March 11, 1918 both of these motions were overruled by the court.

On March 13, 1918 claimant was granted, in open court, leave to file motion to amend findings.

On May 9, 1918 the claimant filed a renewed motion in relation to findings of fact. This motion was overruled by the court on May 27, 1918.

VIII. *Note of Claimant's Application for Appeal with Motion for Restriction of Transcript.*

On August 15, 1918 the claimant filed an application for appeal to the Supreme Court. Incorporated in said application for appeal was a motion to omit from the record on appeal paragraphs II to VII, inclusive, of the findings of fact. On October 21, 1918 the court ordered that the appeal be allowed.

29 Court of Claims.

No. 24915.

THE SEABOARD AIR LINE RAILWAY

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of

the court by Downey, J.; of the judgment of the court; and of the note of, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 5th day of November, A. D., 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN.
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,834. Court of Claims. Term No. 248. The Seaboard Air Line Railway, appellant, vs. The United States. Filed November 25th, 1918. File No. 26,834.